No. 85-2006

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

NATIONAL CAN CORPORATION, *et al.*,
Appellants,

v.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,
Appellee.

ON APPEAL FROM THE SUPREME COURT
OF WASHINGTON

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

JOHN T. PIPER
Counsel of Record
D. MICHAEL YOUNG
FRANKLIN G. DINCES

Bank of California Center
Seattle, Washington 98164
Telephone: (206) 682-5151

Attorneys for Appellants

Of Counsel:
BOGLE & GATES
Bank of California Center
Seattle, Washington 98164
Telephone: (206) 682- 5151

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Appellants submit this brief in opposition to Appellee's Motion to Dismiss or Affirm ("Motion"). Pursuant to Rule 28.1, Appellants state that the only changes to their Designation of Corporate Relationships filed as Appendix G to the Jurisdictional Statement are listed in footnote 1.

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[1]The following entities now own 5% or more of Allis-Chalmers Corporation: United Banks of Colorado, Equitable Life Assurance Society and BEA Associates. The following entities are now affiliates of General Electric Company: RCA/Sharp Microelectronics, Inc.; Page America Group, Inc.; Philippine Global Communications, Inc.; Center for Advanced Television Studies; Earth Observation Satellite Co.; Lodgistix Inc.; Microelectronics and Computer Technology Corp.; Planar Systems, Inc.; Semiconductor Research Center; Hearst/ABC-RCTV; RCA/ Columbia Pictures Home Video; Screen Sport, Ltd.; RCA/Ariola Europe, Ltd.; RCA/Ariola International (Australia); RCA/Ariola International (Brazil); Record Service Benelux N.V.; RCA/Ariola International (Canada; Ariola/RCA Musik G.m.b.H.; Arbos Musicverlag Hans Gerig K.G.; Dean records Musicproductions-und-Verlagsgesell G.m.b.H; MSC Music Center Trontragervertrebs G.m.b.H.; Edizioni Musicale Acqua Azzura S.r.l.; Resolute Casa Editrice Musicale S.r.l.; RVC Corp.; RCA/ Ariola Internacional S. de R.l. de C.; Record Service Benelux B.V.; RCA S.A. (Spain); RCA/Ariola Limited (U.K.); RCA/Columbia Pictures International Video; Gaumont-Columbia Films RCA Video; Vertriebsgellschaft RCA/Columbia Pictures Video G.m.b.H. & Co., K.G.; RCA Columbia Pictures Video S.p.A.; CIC Video -RCA/Columbia Pictures Video S.R.C.; RCA/Columbia Pictures Video, U.K.; Transradio Chilena Compania de Telecommunicacones S.A.; RCA/Ariola International (New York).

I. APPELLEE'S ADMISSIONS AND CLAIMS UNDERSCORE THE SUBSTANTIAL FEDERAL QUESTIONS RAISED.

Appellee seeks to save a tax scheme that it admits "appears discriminatory" by contending that (i) taxes on manufacturing and selling activities are compensatory and (ii) the requirement of internal consistency need not be applied where the issue is discrimination. Motion at 12, 15 & 16. These contentions, right or wrong, present substantial federal questions. If they are wrong, the decision below stands in defiance of *Armco, Inc. v. Hardesty,* 467 U.S. 638 (1984). If meritorious, they nonetheless represent too radical a departure from *Armco* to be accepted without plenary consideration.

A. Appellee, Conceding That Its Tax Appears Discriminatory, Is Forced To Rely On The Compensatory Tax Theory Rejected in *Armco.*

Appellee concedes that "[u]nder the first part of the *Armco* opinion the manufacturing B&O tax appears discriminatory." Motion at 12. Appellee was unable to avoid the concession because the manufacturing tax is imposed on manufacturers whose sales cross state lines — while similarly situated manufacturers who sell within the state are exempt.

The concession of facial discrimination has forced Appellee to adopt a "compensatory tax" theory to save its scheme — despite the explicit rejection of that theory in *Armco.* Motion at 12-15. *Armco* rejected a compensatory tax theory because "manufacturing and wholesaling are not 'substantially equivalent events.' " 467 U.S. at 643. Ignoring those taxable events, which this Court found pivotal, Appellee has diverted the focus to provisions of its scheme. It argues that its tax is "materially different" from the tax invalidated by *Armco.* Motion at 5.

If Appellee's "materially different" premise were correct, a substantial question nonetheless exists as to whether taxes on events that *Armco* found "not substantially equivalent" can

be made "compensatory" simply by different tax provisions. Plenary consideration would be required to repudiate *Armco's* focus on the events taxed. More likely, a substantial question is presented for the reason that Appellee's compensatory tax contention is wrong and in conflict with *Armco.* The premise on which the contention is based — that Washington's scheme is "materially different" than West Virginia's — has been impeached by Appellee's earlier admission that the two schemes are "very similar." *See* Brief of the State of Washington as Amicus Curiae in *Armco* at 1.

Moreover, Appellee's effort to establish that its taxes are "compensatory" is futile. The consequence is simply that the taxes would be considered together in testing for discrimination. This will avail Appellee nothing. For, as the *Armco* Court concluded in the course of considering the compensatory argument:

> Moreover, when the two taxes are considered together, discrimination against interstate commerce persists. If Ohio or any of the other 48 States imposes a like tax on its manufacturers — which they have every right to do — then *Armco* and others from out of state will pay both a manufacturing tax and a wholesaling tax while sellers resident in West Virginia will pay only the manufacturing tax. . . .

463 U.S. at 644. The court subsequently labeled this test for discrimination as a requirement of "internal consistency." *Id.*

Thus, while it is most likely that Appellee's compensatory contention is wrong, it presents a question for plenary consideration in all events. The plain fact is that *Armco* rejected the compensatory theory on which the decision below rests.

B. Appellee's Tacit Admission That Its Tax Lacks Internal Consistency, Coupled With Its Denial That the Requirement Applies Here, Creates An Unavoidable Conflict With *Armco.*

Appellee does not deny that its tax lacks internal consistency. It tacitly admits the lack by its contention that its taxes are

not subject to the requirement[2] which the Court confirmed in *Armco*:

> [T]hat a tax must have 'what might be called internal consistency — that is, the [tax] must be such that, if applied by every jurisdiction,' there would be no impermissible interference with free trade. . . .

467 U.S. at 644.

Rather, Appellee challenges application of an internal consistency test in the context of deciding whether a tax discriminates against interstate commerce.[3] But that is precisely the context in which this Court tested West Virginia's tax scheme for internal consistency in *Armco*. Again, whether right or wrong, Appellee's assertion is too great a departure from *Armco* to accept without plenary consideration.

II. APPELLEE ERRS IN ASSERTING THAT ITS TAXES ARE COMPENSATORY BECAUSE INTERSTATE AND LOCAL BUSINESS PAY THE SAME AMOUNT OF TAX.

Appellee errs in claiming that its taxes result in equal burdens on local and interstate commerce.[4] *See* Motion at 16. Appellee's limited illustration does not mention, for example, that a Washington manufacturer such as National Can, selling $1,000 of product out-of-state, pays a manufacturing tax of $4.40 — but a Washington manufacturer selling the same $1,000 of goods locally pays *no* tax (i.e., *zero*) on

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[2]Motion at 16-21. Appellee concludes:

> [T]his Court should decide the question of whether an internally inconsistent tax system is *per se* discriminatory . . . only in a case in which an actual doubling up can be shown.

Id. at 21 Appellee has previously made its admission explicitly. *See* Brief of the State of Washington as Amicus Curiae at 18, *Armco*.

[3]Appellee does not deny that the internal consistency requirement must be met where apportionment is the issue. *See Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159, 169 (1983). That issue is present here: "Washington's lack of fair apportionment is also challenged by the present appeal." J.S. 7 n.3.

[4]The error in the claim is confirmed by an earlier decision of the court below. *Fibreboard Paper Products Corp. v. State*, 66 Wash.2d 87, 401 P.2d 623 (1965). Fibreboard paid two Washington taxes (on both its in-state manufacturing and selling), instead of the one that would be paid by local commerce, precisely because its products crossed state lines.

the same manufacturing activity. In addition, when National Can sells in Washington $1,000 of goods manufactured out-of-state, it pays a selling tax of $4.40. The result is a tax of $8.80 on $2,000 of activities. A similarly situated intrastate business — manufacturing and selling $1,000 of goods in Washington — also engages in $1,000 of manufacturing and $1,000 of selling ($2,000 of activities), but pays a tax of only $4.40. Thus, National Can performs precisely the *same quantum* of the *same activities* as a wholly local business, *but pays twice the tax.*[5] Washington admits that it is discrimination when interstate commerce pays a higher tax than local business. Motion at 7-8.[6]

III. APPELLEE ERRS IN CLAIMING MISREPRESENTATION OF FACTS—THERE BEING NO FACTUAL DISPUTES ON THIS STIPULATED RECORD.

Appellants are here on a *stipulated* record. (See stipulations of facts in the Jurisdictional Statement, App. H, I, & J; together with pertinent statutes, App. E.) There are no disputed facts, only issues of law. Nonetheless, Appellee claims that "NCC misrepresents the facts" because Appellants characterize the challenged taxes as unapportioned. *See* Motion at 21-23. That is the precise characterization

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[5]Put otherwise, local business gets two activities in Washington for the price of one. Any householder knows that a bargain can take the form of two articles for the price of one as well as a lower price for one article. The "two-for-one deal" (as Appellee termed it before the court below) that Washington gives local business is a difference in form, not substance.

[6]Appellee's argument that its manufacturing and selling taxes are compensatory is untenable for other reasons as well. The characteristics of Washington's taxes that supposedly make its scheme "materially different" from West Virginia's (Motion at 5-6) actually *aggravate* the constitutional defects inherent in Appellee's scheme. Wast Virginia's manufacturing tax was apportioned. Washington's is not. Motion at 5-6. The difference in West Virginia's tax rates favored interstate commerce. As *amici* COST and 25 other taxpayers have pointed out, to the extent that Washington's rates are equal, they are less favorable to interstate commerce than West Virginia's. *See* Brief of *Amici Curiae* Amcord, Inc., *et al.* in Support of the Jurisdictional Statement at 7-8; Brief of the Committee on State Taxation of the Council of State Chambers of Commerce as *Amicus Curiae* in Support of Appellant's Jurisdictional Statement at 8 & n.l.

given Washington's tax in the decision chiefly relied upon by Appellee. *General Motors Corp. v. Washington,* 377 U.S. 436 (1964) (characterizing Washington's wholesaling tax as "unapportioned and . . . therefore, suspect." *Id.* at 448).[7]

Appellee makes a like error (in claiming "misrepresentation") by attacking Appellants' observation that actual multiple taxation is present here. *See* Motion at 21-22. The statement was based on stipulated facts that were quoted verbatim in the Jurisdictional Statement (App. H, I & J).[8] Appellee's argument that multiple taxation cannot exist because Washington's tax is measured by gross receipts, while "NCC pays taxes measured by net income (gross income minus deductions) in other states" (Motion at 22) exalts formalism over economic substance.

CONCLUSION

For the foregoing reasons, as well as the reasons stated by *amici,* Council of State Chambers of Commerce and 25 other

[7]Washington's wholesaling tax is measured by 100% of Appellant's gross receipts from customers who are in Washington, even though "[i]n order to sell . . . products in Washington . . . NCC maintains . . . facilities in states other than Washington, and employs many people outside the state . . . ." J.S., App. I-2, ¶ 5. Therefore, the challenged taxes are unapportioned. Washington's manufacturing tax is likewise unapportioned. It was measured by Appellants' gross sales in other states of products manufactured in Washington. RCW 82.04.240 & RCW 82.04.450; J.S., App. E-2, E-8 & I-4, ¶ 14.

[8]For example, the parties have stipulated that "NCC pays taxes to other jurisdictions on income derived in those locations from the sale of products manufactured in Washington" and that 'NCC's gross proceeds from the same goods are also used by Washington as the measure of its manufacturing tax on NCC." J.S., App. I-3, ¶ 14. National Can also "pays taxes to other jurisdictions on income derived from its sales of products in Washington. . . . NCC's gross proceeds from the same goods are also used by Washington as the measure of its wholesaling tax on NCC. . . ." J.S., App. I-4, ¶ 15.

interstate taxpayers, the Motion to Dismiss or Affirm should be denied and the Court should note probable jurisdiction.

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Respectfully Submitted,

JOHN T. PIPER
Counsel of Record
D. MICHAEL YOUNG
FRANKLIN G. DINCES
Attorneys for Appellants

Of Counsel
BOGLE & GATES